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3
4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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7 JMP SECURITIES LLP,) Case No. 11-4498 SC
8)
9 Plaintiff,) ORDER DENYING DEFENDANT'S
10) MOTION FOR JUDGMENT ON THE
11 v.) PLEADINGS
12)
13 ALTAIR NANOTECHNOLOGIES INC.,)
14)
15 Defendant.)
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14 I. INTRODUCTION

15 This case presents a straightforward contract interpretation
16 dispute that has been substantially complicated by choice-of-law
17 issues. Plaintiff JMP Securities Inc. ("JMP") is a financial
18 services firm. Defendant Altair Nanotechnologies Inc. ("Altair"),
19 a Canadian corporation, provides advanced battery technology to the
20 renewable energy industry. Altair hired JMP to serve as a
21 financial advisor. The parties reduced their agreement to a
22 signed, written contract. The contract provided JMP with a certain
23 fee if Altair was sold to or merged with another company, and with
24 another, higher fee if Altair received a "strategic investment."
25 The parties agree that Altair entered into a transaction covered by
26 the agreement, but they dispute whether the transaction was a sale
27 or a strategic investment, and hence whether Altair owes JMP the
28 higher or lower fee.

1 Complicating matters is the fact that the parties assume that
2 some claims arising from their agreement, which contained a choice-
3 of-law clause, are governed by the substantive law of New York
4 while others are governed by the substantive law of California. As
5 explained in Section IV.A infra, that assumption is incorrect. The
6 Court, after undertaking a conflict-of-law analysis omitted by the
7 parties themselves, concludes that the agreement is entirely
8 governed by the substantive law of New York, with the possible
9 exception of its attorney fee provisions.

10 Suing in diversity pursuant to 28 U.S.C. 1332, JMP brings four
11 claims: (1) breach of contract, (2) promissory estoppel, (3) fraud,
12 and (4) negligent misrepresentation. ECF No. 1 ("Compl."). Altair
13 has moved for judgment on the pleadings, and the Motion has been
14 fully briefed. ECF Nos. 21 ("Mot."), 23 ("Opp'n"), 26 ("Reply").
15 Pursuant to Civil Local Rule 7-1(b), the Court determines that the
16 Motion is suitable for determination without oral argument. For
17 the reasons set forth below, the Court DENIES Altair's motion for
18 judgment on the pleadings.

19
20 **II. BACKGROUND**

21 In considering Altair's motion for judgment on the pleadings
22 the Court takes as true all the well-pleaded allegations of JMP's
23 complaint and reads them in the light most favorable to JMP. Hal
24 Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542,
25 1550 (9th Cir. 1990). The Court also considers the exhibits JMP
26 attached to its complaint. United States v. Ritchie, 342 F.3d 903,
27 908 (9th Cir. 2003).

28 ///

1 **A. The Agreement**

2 1. Fee Provisions

3 On July 8, 2010, JMP and Altair executed a written Agreement.
4 Compl. ¶ 11; ECF No. 21 Ex. A ("Agr."). Under the terms of the
5 Agreement, Altair engaged JMP's services as a financial advisor.
6 Compl. ¶ 11. The Agreement contemplated several kinds of business
7 deals that Altair might undertake. Id. Two kinds are relevant
8 here. The Agreement contemplated that an outside party might buy
9 or merge with Altair. See id. ¶ 13. It also contemplated that
10 Altair might receive a "strategic investment." Id. ¶ 14.

11 In either case, JMP would receive a fee for helping Altair
12 conclude the transaction; the size of the fee would depend on the
13 type of the deal. Id. ¶ 15. For a sale or merger, JMP would
14 receive "a cash fee equal to [2 percent] of the consideration
15 involved in the Sale or Merger, subject to a minimum fee of
16 \$750,000." Id. ¶ 16 (quoting Agr. at 2). The Agreement also
17 included a "gross-up provision" that would apply if Altair effected
18 only a partial sale or merger, so long as the transaction
19 transferred control of Altair. Id. ¶ 18 (quoting Agr. at 3). The
20 gross-up provision would calculate JMP's fee proportionate to the
21 size of the stake in Altair acquired by the third party. Id.
22 Notably, the parties appear to have had a particular third party in
23 mind: The Agreement provided JMP with a lower fee if Altair
24 consummated a sale or merger "with Yintong Energy Company Limited
25 ["Yintong"], its parent corporation, or its subsidiaries"
26 Id. ¶ 17. In such cases, the basis for JMP's fee would be 1.7
27 percent (the "Sales/Merger Fee") instead of 2 percent. Id.

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The Agreement provided a comparable but separate fee structure if Altair received a strategic investment. In such cases, Altair agreed to pay JMP "a cash fee equal to [6 percent] of the gross proceeds of the placement" Id. ¶ 19 (quoting Agr. at 2). Again, Altair appeared to have its eye on Yintong: A strategic investment by Yintong would entitle JMP to a fee of 4 percent (the "Strategic Investment Fee") rather than 6 percent. Id.

2. Other Provisions: Indemnification, Integration, Choice of Law

The Agreement contained three other provisions relevant to the instant motion. First, it incorporated an attached Indemnification Agreement. Agr. Ex. A ("Indem. Agr."). JMP alleges that the Indemnification Agreement and certain other language in the Agreement entitle it to recover attorney fees stemming from the instant lawsuit. Compl. ¶¶ 20-22, 44. Second, the Agreement contains an integration clause stating that the Agreement, including the incorporated Indemnification Agreement, "contains the entire agreement" between JMP and Altair. Id. ¶ 23 (quoting Agr. at 5). The Agreement also provides, however, for amendment by a "writing signed by the party against whom it is sought to be enforced." Id. Third, the Agreement contains a choice-of-law clause stating that the Agreement "shall be governed by and construed in accordance with the internal laws of the State of New York without giving effect to any principles of conflicts of law." Id. ¶ 11; Agr. at 5.

B. The Transaction

Around September 20, 2010, Altair entered into a share subscription agreement with Canon Investment Holdings Limited

("Canon"), which operates through Yintong, its indirect and wholly owned subsidiary. Compl. ¶ 24. Altair agreed to issue, and Canon agreed to purchase, shares of common stock such that Canon would own 51 percent of Altair. Id. On July 22, 2011, Altair and Energy Storage Technology (China) Group Limited ("Energy Storage"), an affiliate of Canon, executed an amended version of the share subscription agreement (the "Transaction"). Id. At the conclusion of the Transaction, Energy Storage -- and thus, for purposes of the Agreement, Yintong -- owned 53.3 percent of the outstanding common shares of Altair, or 49.8 percent on a fully diluted basis. Id.

C. JMP's Extrinsic Evidence

JMP points to four pieces of extrinsic evidence which, it asserts, establish that Altair knew the Transaction to be a strategic investment rather than a sale or merger.

1. Proxy Statement

JMP alleges that before executing the Agreement or concluding the Transaction, JMP and Altair executives arrived at a "shared understanding" that any transaction "in which proceeds are received by Altair, as opposed to its shareholders, would be considered a Strategic Investment for purposes of JMP's compensation." Id. ¶¶ 25-26. According to JMP, the parties publicly confirmed this understanding in a Proxy Statement filed with the U.S. Securities and Exchange Commission ("SEC") on November 15, 2010. Id. ¶ 26 (citing id. Ex. B ("Proxy Stmt.")). The Proxy Statement provides: "Altair has agreed to pay [JMP] a transaction fee for its financial advisory services equal to [4] percent of the transaction consideration" Proxy Stmt. at 26. The 4 percent figure accords with the Strategic Investment Fee. The Proxy Statement

1 also characterizes the negotiations between Canon and Altair which
2 led up to the Transaction as having concerned "potential strategic
3 investment" Id.

4 2. Fairness Opinion

5 The Proxy Statement incorporated a September 16, 2010 Fairness
6 Opinion by JMP. Compl. ¶ 27 (quoting ECF No. 21-4 at 82-85
7 ("Fairness Op.")). JMP asserts that the Fairness Opinion further
8 confirmed the parties' understanding of the Transaction as a
9 strategic investment. The Fairness Opinion states that Altair told
10 JMP the Transaction would be a "private placement." Id. JMP also
11 alleges that when Altair asked JMP to prepare the Fairness Opinion,
12 Altair did not ask JMP to address "transactions involving a merger
13 or sale of assets" See id.

14 3. Conference Call Transcript

15 JMP cites a transcript of a conference call held September 20,
16 2010, the day after the Transaction. Id. Ex. C ("Conf. Call
17 Trans."). On the call, Altair's President and Chief Executive
18 Officer characterized the Transaction as a "nearly \$48.9 million
19 strategic investment in Altair." Id. ¶ 28 (citing Conf. Call
20 Trans. at 2).

21 4. Slide Show Presentation Filed with SEC

22 JMP also points to a slide show presentation filed with the
23 SEC on September 20, 2020. Id. Ex. D ("Slide Show"). One slide is
24 titled: "Communication To Announce Strategic Investment In Altair."
25 Id. ¶ 28 (quoting Slide Show at 3).

26 D. Calculations Pertaining to JMP's Fee

27 JMP alleges that the gross proceeds from the Transaction were
28 roughly \$57.5 million. Id. ¶ 30. The Court notes that 1.7 percent

1 of \$57.5 million is roughly \$830,000. With respect to its breach
2 of contract claim, JMP asserts three theories of recovery which,
3 JMP says, entitle it to recover more than \$830,000.

4 First, JMP asserts that the terms of the Agreement itself
5 obligate Altair to pay the 4 percent Strategic Investment Fee
6 rather than the 1.7 percent Sales/Merger Fee. See id. JMP alleges
7 that Altair has not paid either fee and therefore owes JMP, after
8 credit for certain other payments previously made, "at least
9 \$2,150,430.16." Id.

10 Second, JMP argues in the alternative that the Proxy Statement
11 modified the Agreement and entitles JMP to the Strategic Investment
12 Fee (that is, the same figure previously alleged, approximately
13 \$2.15 million). See id. ¶¶ 32-34.

14 Third, as a final alternative, JMP asserts that if the Court
15 ultimately deems the Transaction to have been a sale or merger, JMP
16 still would be "entitled to a fee calculated according to the
17 gross-up provision in the Agreement." Id. ¶ 35. JMP states that
18 under the gross-up provision Altair would owe it "at least
19 \$1,813,218.51." Id. ¶ 37. The instant motion by Altair challenges
20 JMP's first two theories of contract recovery but not the third,
21 gross-up theory. Mot. at 8 n.1.

22
23 **III. LEGAL STANDARD**

24 "After the pleadings are closed -- but early enough not to
25 delay trial -- a party may move for judgment on the pleadings."
26 Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when
27 the moving party clearly establishes on the face of the pleadings
28 that no material issue of fact remains to be resolved and that it

is entitled to judgment as a matter of law." Hal Roach Studios, 896 F.2d at 1550. Moreover, a motion for judgment on the pleadings is subject to the same standard of review as a motion to dismiss, and thus the pleading must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Johnson v. Rowley, 569 F.3d 40, 44 (2d Cir. 2009); see also Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1055 n.4 (9th Cir. 2011) (citing Johnson with approval). A claim is plausible on its face when the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

IV. DISCUSSION

A. Choice of Law

The presence of a choice-of-law clause in the Agreement and colorable conflict-of-law issues in the parties' briefing requires the Court to determine, before it addresses the claims on their merits, which state's substantive law applies to each claim. This analysis unfolds in three steps. Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006). First, the Court must determine which choice-of-law rules to apply. See id. This question turns on the type of jurisdiction exercised by the Court.¹ Zicherman v.

¹ JMP suggests that parties can contract around federal conflict-of-law rules. Opp'n at 14 n.7. JMP cites no authority for this proposition and the Court's review has revealed none. On the contrary, the language, reasoning, and policy of Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), and its progeny

1 Korean Air Lines Co., Ltd., 516 U.S. 217, 228-29 (1996). In the
 2 next step, the Court applies the correct choice-of-law rules to
 3 determine which substantive law applies to each claim. See Huynh,
 4 465 F.3d at 997. Only then may the Court proceed to the merits and
 5 apply the correct substantive law. See id.

6 The first question, which choice-of-law rules apply, is easily
 7 resolved: "Federal courts sitting in diversity must apply the forum
 8 state's choice of law rules to determine the controlling
 9 substantive law." Fields v. Legacy Health Sys., 413 F.3d 943, 950

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 11 suggest that the opposite is true. See, e.g., Day & Zimmermann,
 12 Inc. v. Challoner, 423 U.S. 3, 4 (1975) (federal court sitting in
 13 diversity "must" apply conflict-of-law rules of the forum state),
 14 Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 484 (9th Cir.
 15 1987) (same mandatory language); Abogados v. AT&T, Inc., 223 F.3d
 16 932, 934 (9th Cir. 2000) (same); Kohlrantz v. Oilmen Particip.
 17 Corp., 441 F.3d 827, 833 (9th Cir. 2006) (same). A federal court's
 18 selection of the proper body of choice-of-law rules turns on the
 19 type of subject-matter jurisdiction that the court is exercising.
 20 See, e.g., Patton v. Cox, 276 F.3d 493, 495 (9th Cir. 2002) ("When
 21 a federal court sits in diversity, it must look to the forum
 22 state's choice of law rules to determine the controlling
 23 substantive law."); Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287,
 24 1297 (9th Cir. 1997) ("Federal common law applies to choice-of-law
 25 determinations in cases based on federal question jurisdiction . .
 26 . ."); Paracor Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d
 27 1151, 1164 (9th Cir. 1996) ("In a federal question action where the
 28 federal court is exercising supplemental jurisdiction over state
 claims, the federal court applies the choice-of-law rules of the
 forum state"); Aqua-Marine Constructors, Inc. v. Banks, 110
 F.3d 663, 670 (9th Cir. 1997) ("[A] federal court sitting in
 admiralty must apply federal maritime choice-of-law rules."). This
 suggests that a federal court cannot give effect to a contractual
 provision that purports to strip it of its ability to select the
 right choice-of-law rules, insofar as that choice is jurisdictional
 in nature. Moreover, the principle espoused by JMP risks reducing
 the federal courts to a taxpayer-funded version of private
 arbitration, in which the parties may contract for whatever rules
 of decision or procedure they wish. The Court accordingly has
 grave reservations about JMP's position. Ultimately, however, the
 Court need not decide the issue it raises because, as explained
 below, California's choice-of-law rules result in the application
 of New York substantive law to all four of JMP's claims -- which is
 the result that JMP says it achieved through its conflicts-of-law
 clause. Because the point is moot, the Court declines to decide
 it.

(9th Cir. 2005) (quotation omitted). Because this Court is sitting in diversity in California, it must apply California's choice-of-law rules. The next question is, under California's choice-of-law rules, which state's substantive law applies to each claim.

1. The Nedlloyd Test

The Agreement includes a choice-of-law clause selecting the substantive law of New York state. Agr. at 5. This clause is the beginning, not the end, of the discussion about what substantive law applies. When parties to a contract bargain for an explicit choice-of-law provision, courts applying California's choice-of-law rules follow Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459 (Cal. 1992).² In that case, the California Supreme Court explained that "the proper approach under [California's choice-of-law rules] is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law." Id. at 466. Usually, parties address themselves only to the first, "substantial relationship" prong of this test, and satisfy it, if at all, by establishing that one of the parties is a citizen of, or has their principal place of business within, the jurisdiction whose substantive law they have chosen. E.g., Ruiz v. Affinity Logistics Corp., --- F.3d ---, No.

² The Court must "explicitly apply" these rules. Hoffman v. Citibank (South Dakota), N.A., 546 F.3d 1078, 1083 (9th Cir. 2008); see also ABF Capital Corp. v. Grove Props. Co., 126 Cal. App. 4th 204, 215 (Cal. Ct. App. 2005) (requiring courts applying California's choice-of-law rules to "include all the relevant steps in [their] analysis" and criticizing courts who "simply pass[] over" the analysis). The Court therefore adopts a skeptical posture toward counsel's assurances that no conflict-of-law issues are presented here.

10-55581, 2012 WL 388171, at *3 (9th Cir. Feb. 8, 2012)
 (substantial relationship found where parties chose Georgia state
 law and one party was incorporated and had its principal place of
 business in Georgia); Hatfield v. Halifax PLC, 564 F.3d 1177, 1183
 (9th Cir. 2009) (English law applied where one party was
 incorporated in United Kingdom). Some courts appear to blur the
 line between the two prongs by equating a "reasonable basis" with a
 "substantial relationship." See, e.g., Expansion Pointe Props.
Ltd. P'ship v. Procopio, Cory, Hargreaves & Savitch, LLP, 152 Cal.
 App. 4th 42, 59 (Cal. Ct. App. 2007).

This case, however, illustrates a distinct application of
Nedlloyd's separate "reasonable basis" test. Neither JMP nor
 Altair is incorporated in New York or has its principal place of
 business in New York.³ Neither party, then, satisfies the
 substantial relationship test as it is usually applied.
 Nevertheless, the Court concludes under Nedlloyd's second prong
 that there is a "reasonable basis" for applying New York
 substantive law here because the Agreement contains a forum
 selection clause in which both parties consented to "personal
 jurisdiction and exclusive venue in the federal or state courts
 located in either San Francisco, California, or New York, New York
" Agr. at 5. Applying New York substantive law serves to
 protect the parties' legitimate expectation that a New York state
 court -- or for that matter a federal court sitting in diversity in
 California -- would apply the parties' chosen law.

³ Altair is a Canadian corporation with its principal place of
 business in Reno, Nevada, and JMP is a Delaware corporation with
 its principal place of business in San Francisco, California.
 Compl. ¶¶ 1-2.

Having found that Nedlloyd's reasonable basis test is met here, "the court must next determine whether the chosen state's law is contrary to a fundamental policy of California." Nedlloyd, 3 Cal. 4th at 466 (emphasis in original). The parties raise one colorable issue in this regard: the conflict between New York and California law regarding reciprocity of contractual attorney fee provisions. JMP claims that the Agreement entitles it to attorney fees. See Section II.A.2 supra; Compl. ¶¶ 20-22, 44. Altair, citing New York substantive law, disagrees: It argues that the Agreement provides indemnification for attorney fees only in the context of third-party claims, not claims between JMP and Altair themselves.⁴ Mot. at 13-16. But, Altair says, even if the Agreement did entitle JMP to attorney fees in this case, "California law would make the provision reciprocal under California Civil Code section 1717(a)." Id. at 16 n.4 (citing ABF Capital, 126 Cal. App. 4th at 214 (California statute requiring reciprocity of attorney fee provisions "reflects a fundamental

⁴ Altair assures the Court that "[b]ecause the Agreement does not include a unilateral attorneys' fee provision covering litigation between the contractual parties, no conflict with California law is presented," and then proceeds to argue how the attorney fee issue would come out if, hypothetically, a conflict were presented. Mot. at 16 n.4. The Court, first, disagrees with Altair's assurance, and second, the Court will not entertain a hypothetical dispute. It is apparent that New York and California law differ in their treatment of attorney fee reciprocity. Indeed, Altair is the one who brings up the difference. It is equally apparent that the Court must ascertain which body of law applies before applying it. The Court takes Altair's discussion of attorney fee reciprocity to be a shot fired across JMP's bow, warning JMP that those who live by attorney fees may die by them too. What Altair appears not to realize is that by firing that shot, it also invited this Court to decide an issue using a rule of decision not properly before it -- that is, to render an advisory opinion. The Court may not and will not do that. Golden v. Zwickler, 394 U.S. 103, 108 (1969). The parties are responsible for ascertaining what the proper substantive law is and placing it before the Court for decision.

1 policy of this state"))).

2 JMP responds that California law is inapplicable because the
3 parties agreed to be governed by New York law "without giving
4 effect to any principles of conflicts of law." Opp'n at 14 n.7
5 (quoting Agr. at 5). As explained in footnote 1 supra, the Court
6 is highly skeptical of JMP's position. But neither can the Court
7 uncritically accept Altair's position, because Altair assumes that
8 a conflict between the parties' chosen law and a fundamental policy
9 of California law ends the discussion. It does not:

10 If, however, there is a fundamental conflict with
11 California law, the court must then determine whether
12 California has a "materially greater interest than the
13 chosen state in the determination of the particular issue
14" [Citation.] If California has a materially
15 greater interest than the chosen state, the choice of law
shall not be enforced, for the obvious reason that in
such circumstance we will decline to enforce a law
contrary to this state's fundamental policy.

16 Nedlloyd, 3 Cal. 4th at 466. Altair disregards this final step of
17 the Nedlloyd analysis. Consequently, the Court cannot determine
18 which body of substantive law applies to the Agreement's attorney
19 fee provisions. The parties have assumed that New York law
20 controls, but it could be that California has a materially greater
21 interest than New York in having its law applied here. If so, the
22 Agreement's choice-of-law clause would be unenforceable with
23 respect to JMP's claim for attorney fees and the Court would apply
24 California rather than New York law.

25 The parties have not briefed this issue and the Court will not
26 do it for them. Altair bears the burden of showing that the
27 applicable substantive law entitles it to judgment on the face of
28 the pleadings. Because Altair has not taken the requisite

1 preliminary step of ascertaining which substantive law applies,
 2 Altair has not carried its burden. Therefore, with respect to
 3 JMP's breach of contract claim for attorney fees, Altair's motion
 4 for judgment on the pleadings is DENIED.

5 2. Scope of Choice-of-Law Clause

6 Having disposed of the one conflict of law raised by the
 7 parties, the Court still must address another question raised by
 8 the briefs: which of JMP's four claims are covered by the
 9 Agreement's choice-of-law clause.⁵ As the Court has already
 10 explained, this question is controlled by California's choice-of-
 11 law rules, not, as Altair asserts, New York substantive law, nor,
 12 as JMP argues, the parties' contract. In California,

13 a valid choice-of-law clause, which provides that a
 14 specified body of law "governs" the "agreement" between
 15 the parties, encompasses all causes of action arising
 16 from or related to that agreement, regardless of how they
 17 are characterized, including tortious breaches of duties
 emanating from the agreement or the legal relationships
 it creates.

18 Nedlloyd, 3 Cal. 4th at 470. All four of JMP's claims fit this
 19 description. The choice-of-law clause at issue here provides: "The
 20 Agreement . . . shall be governed by and construed in accordance
 21 with the internal laws of the State of New York without giving
 22 effect to any principles of conflicts of law." Agr. at 5. JMP's
 23 breach of contract and promissory estoppel claims both sound in

24 ⁵ The parties briefed the breach of contract claim as if it were
 25 governed by New York law (though, as the Court just discussed, they
 26 disputed the effect of California law on attorney fees). They
 27 briefed the fraud and negligent misrepresentation claims as if
 28 those were governed by California law (though that is, as explained
 below, incorrect). The parties appear to have "agreed to disagree"
 about which substantive law applies to the promissory estoppel
 claim (though the Court, of course, must ascertain and apply the
 correct body of law to rule on the instant motion).

contract⁶ and clearly arise from and relate to the Agreement. JMP's fraud and negligent misrepresentation claims assert "tortious breaches of duties emanating from the agreement." Therefore, under California's choice-of-law rules, New York substantive law governs all four claims, with the caveat discussed in Section IV.A.1 concerning attorney fees. Altair, however, briefed its motion for judgment on JMP's promissory estoppel, fraud, and negligent misrepresentation claims using California substantive law. Mot. at 16-23; Reply at 9-14. JMP followed suit, defending these claims using California substantive law. Opp'n at 14-22. In short, for at least three of JMP's four claims, the parties failed to put the proper rules of decision before the Court.

The Court is not inclined to fill in gaps in the parties' briefing with any more independent research than it has already conducted. Altair bears the burden of showing that it is entitled to judgment on the pleadings and, because it has failed to cite and apply the correct law, it has not carried its burden. Therefore, the Court DENIES Altair's motion for judgment on the pleadings with respect to JMP's claims for promissory estoppel, fraud, and negligent misrepresentation.

B. Breach of Contract Under the Agreement

The Court now proceeds to apply New York substantive law to the remaining claims on which Altair has moved for judgment on the pleadings: (1) JMP's claim that the Agreement itself obligates

⁶ Altair incorrectly suggests that promissory estoppel is a tort claim. Promissory estoppel is a contract doctrine "which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced." Kajima/Ray Wilson v. Los Angeles Cnty. Metro. Transp. Auth., 23 Cal. 4th 305, 310 (Cal. 2000).

1 Altair to pay the Strategic Investment Fee, and (2) in the
2 alternative, that the Proxy Statement modified the Agreement such
3 that Altair owes JMP the Strategic Investment Fee.

4 1. Breach of Contract Under the Agreement

5 JMP's primary claim is that the Agreement entitles it to
6 receive from Altair the 4 percent fee triggered by a strategic
7 investment from Yintong. JMP points to a variety of extrinsic
8 evidence which, it says, establishes that Altair and JMP understood
9 the Transaction to be a strategic investment rather than a sale or
10 merger. Section II.C supra; Opp'n at 7-8. JMP also observes that
11 "nothing in the Agreement addresses what fee provision applies in
12 the event that the Transaction falls within the definition of both
13 terms." Opp'n at 8. Altair responds that the Agreement is
14 unambiguous on its face and that JMP therefore may not introduce
15 extrinsic or parol evidence to vary its terms -- terms which,
16 Altair says, entitle JMP only to the Sale/Merger Fee. Mot. at 9;
17 Reply at 3.

18 The Court disagrees with Altair. Under New York law, contract
19 language is ambiguous if it "is capable of more than one meaning
20 when viewed objectively by a reasonably intelligent person who has
21 examined the context of the entire integrated agreement and who is
22 cognizant of the customs, practices, usages and terminology as
23 generally understood in the particular trade or business." Seiden
24 Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir.
25 1992) (applying New York state law) (quotation marks and citations
26 omitted). "Conversely, language is not ambiguous when it has a
27 definite and precise meaning, unattended by danger of misconception
28 in the purport of the contract itself, and concerning which there

1 is no reasonable basis for a difference in opinion." Id.
 2 (quotation marks and citations omitted). Here, the Court has
 3 examined the context of the entire integrated Agreement and still
 4 discerns a reasonable basis for a difference in opinion. As Altair
 5 notes, the Agreement spells out a lengthy definition of "Sale or
 6 Merger." See Agr. at 1. But while the Agreement may be clear as
 7 to what constitutes a Sale or Merger, its definition of a Strategic
 8 Investment is, to the extent that it is a definition at all,
 9 circular.

10 The purported definition crops up in a sentence describing the
 11 types of deals Altair might make. See id. This sentence, which
 12 refers to Altair as "the Company," provides in pertinent part that
 13 JMP's services "may lead to a sale or merger of the Company (a
 14 'Sale or Merger') . . . or a strategic investment of Equity
 15 Interests (defined below) of the Company by financial or strategic
 16 investors (a 'Strategic Investment')" Id.⁷ In other
 17 words, a strategic investment is one made by a strategic investor.
 18 That definition is not clear enough to establish by itself that the
 19 Transaction was not a strategic investment, for the simple reason
 20 that it does not explain what a strategic investment is other than
 21 that it involves the acquisition of "Equity Interests." It is
 22 undisputed that Yintong through Canon purchased "Equity Interests"
 23 in Altair. Given that the Court must draw all reasonable
 24 inferences in JMP's favor, the Court cannot say on the basis of the
 25 Agreement alone that the Transaction clearly was not a Strategic

26 ⁷ The Agreement's definition of "Equity Interests" does not bear on
 27 the question here. The term means: "equity securities, rights,
 28 warrants, or convertible debt or preferred equity securities or any
 membership or partnership interests representing an interest in the
 equity or net earnings of the Company" Agr. at 1.

1 Investment. The Agreement is ambiguous in this regard. And once
2 an "ambiguity is found, it must be resolved -- as well as all
3 inferences drawn -- against the moving party, which has the burden
4 of establishing that no facts material to the outcome of the
5 litigation are in dispute." Seiden Assocs., 959 F.2d at 429.

6 Moreover, the Court agrees with JMP that the Agreement
7 provides no guidance as to which fee applies when a transaction
8 falls within both its relatively specific definition of a "Sale or
9 Merger" and its amorphous description of a "Strategic Investment."
10 See Opp'n at 8-10. Altair is correct that under the Agreement "a
11 transaction cannot simultaneously be both," Reply at 4, but of
12 course that does not prove which kind of deal the Transaction was.
13 The purported definition of "Strategic Investment" says nothing
14 except that such transactions involve the acquisition of "Equity
15 Interests" -- an activity which is wholly compatible with
16 investment, sale, or merger. Altair argues that the more specific
17 language defining "Sale or Merger" should take precedence over the
18 more general description of "Strategic Investment." Reply at 4.
19 But on the facts of this case such a reading would construe every
20 transfer of equity interests as a sale or merger, simply because it
21 is impossible to tell from the face of the Agreement what a
22 strategic investment is. The parties clearly did not contemplate
23 this result and the Court respects their intent.

24 Altair bears the burden of showing that the face of the
25 Agreement unambiguously denies JMP the relief it requests, and
26 Altair has not carried that burden. Accordingly, the Court DENIES
27 Altair's motion for judgment on the pleadings with respect to JMP's
28 claim for breach of contract arising from the Agreement itself.

2. Modification of the Agreement by the Proxy Statement

JMP also brings an alternative breach of contract claim. JMP asserts that if the Agreement alone does not establish that JMP is entitled to the Strategic Investment Fee, then the Proxy Statement modifies the Agreement so that it does. See Compl. ¶¶ 25-26, 32-34, 43. Altair argues that JMP has failed to plead the requisite elements of contract modification, which Altair identifies as offer, acceptance, consideration, and mutual assent. Mot. at 12; Reply at 5. JMP responds that New York permits modification without consideration if there is a signed writing, and that, in any event, the question of whether the Proxy Statement modified the Agreement is properly one for the trier of fact. Opp'n at 11-12.

The Court agrees with JMP. New York law requires a party asserting contract modification to allege all the usual elements of contract formation, that is, offer, acceptance, and consideration. Beacon Terminal Corp. v. Chemprene, Inc., 428 N.Y.S.2d 715, 718 (N.Y. App. Div. 1980). But New York also has codified the general rule that consideration is not required if a purported modification is contained in a writing signed by the party against whom enforcement is sought. N.Y. Gen. Oblig. Law § 5-1103 (McKinney 2010). Here, the Proxy Statement is a writing and it was signed by Altair's president and chief executive officer. Compl. ¶ 33.

As to offer and acceptance, there are not enough facts available to ascertain whether the Proxy Statement was itself an offer, an acceptance, the parties' reduction to writing of a previous agreement to modify, or none of the above. The precise question at this stage of the case is whether Altair has established from the face of the pleadings alone that JMP not only

1 has not, but cannot plausibly claim modification. Altair has not
2 carried this burden. JMP alleges the existence of negotiations in
3 which JMP stated, and Altair agreed, that the Transaction
4 constituted a strategic investment. Id. ¶ 25. JMP alleges that
5 these negotiations occurred "both before entering into the
6 [Agreement] and during the transaction with Canon" Id. It
7 is therefore unclear when and how, if at all, the parties offered
8 and agreed to modify the Agreement through the Proxy Statement.
9 This issue is properly one for the trier of fact. And the mere
10 fact that the precise mechanics of the modification, if any, are as
11 yet unclear does not by itself make JMP's modification claim
12 implausible. On the contrary, the Proxy Agreement says just what
13 one would expect if Altair did indeed regard itself as owing JMP
14 the 4 percent Strategic Investment Fee.

15 The Court DENIES Altair's motion for judgment on the pleadings
16 with respect to JMP's claim for breach of contract arising from the
17 Proxy Statement's purported modification of the Agreement.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court DENIES Altair's motion
3 for judgment on the pleadings. JMP's claims for breach of contract
4 arising from the Agreement, from the Proxy Statement's purported
5 modification of the Agreement, and from the Agreement's attorney
6 fee provisions, remain undisturbed. So does JMP's claim for breach
7 of contract related to the gross-up provision, which Altair did not
8 challenge. Additionally, JMP's promissory estoppel, fraud, and
9 negligent misrepresentation claims remain undisturbed.

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11 IT IS SO ORDERED.

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13 Dated: March 14, 2012



14 UNITED STATES DISTRICT JUDGE
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